Supreme Court of the United States.

October Term, 1898.

Filed Oct. 31, 1898.

THE UNITED STATES,
Appellant,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY and the RIO GRANDE IRRIGATION AND LAND COMPANY, Limited.

No. 215.

BRIEF FOR APPELLEE.

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WASHINGTON, D. C.:
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1898.

IN THE

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STATEMENT.

This case in here on appeal from the Supreme Court of the Territory of New Mexico. It was commenced by bill of complaint filed on behalf of the United States in the Third Judicial District of said Territory, to restrain the defendant corporation, The Rio Grande Dam and Irrigation Co., from constructing a dam and establishing a reservoir with canals, ditches, etc., for the purposes of irrigation, at Elephant Butte, a point on the Rio Grande about 125 miles north of El Paso, Texas. The bill declares the river to be navigable at certain points below El Paso, and that above El Paso, to and beyond the site of the

proposed dam, it carried such quantity of water, "and by reason of the conformation of the bed and banks, and the channel thereof, makes navigation of such last-mentioned portion of said river a feasible accomplishment;" and that the proposed dam would "materially affect the navigability of said Rio Grande, and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico;" further declared that the dam was not "affirmatively authorized by law," and was without the permission and approval of the Secretary of War, and was, therefore, a proposed violation of Section 10 of the act of Congress of September 19, 1890, and of Section 3 of the act of July 13, 1892, and hence prayed for an injunction.

Subsequently, the complainant filed an amended bill making the Rio Grande Irrigation and Land Company, Limited, an additional defendant.

The material allegations of this amended bill are that the river is navigable for steamboats from its mouth to Roma, about 350 miles; "and is susceptible of navigation and has been navigated above Roma to a point about 150 miles below El Paso, in the State of Texas," where the alleged navigation is said to be interrupted by falls and rapids, but above these obstructions it is declared that it is "susceptible of navigation up to La Joya, in the Territory of New Mexico, about 100 miles above Elephant Butte, where defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya has, at different times, been used for the purposes of floating and transporting rafts, logs, and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes. And

complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico."

The amended bill also alleges that the proposed dam has not been affirmatively authorized by law, nor received the sanction of the Secretary of War, and that the navigability of the river at El Paso has been recognized by Congress.

Also, that the construction of the proposed dam would be in violation of the treaty relations existing between the United States and the Republic of Mexico.

To these complaints the defendants filed a joint plea and a joint answer. The plea alleges that the site of the proposed dam is wholly within the Territory of New Mexico, and within the arid region thereof; that in pursuance of various acts of Congress the Secretary of the Interior and the officers of the Geological Survey located and segregated from the public domain a reservoir site called "No. 38," on the river just above Elephant Butte, and another site called "No. 39," just below that point, and that subsequently, in pursuance of another act of Congress, these, and all other reservoir sites located under the acts of Congress, were thrown open to corporate and private entry, and the defendant, The Rio Grande Dam and Irrigation Co., had duly applied to enter the two sites so numbered "38" and "39"; that the defendant, The Rio Grande Dam and Irrigation Co., was duly organized under the laws of New Mexico, and had complied with the same in reference to the construction of dams and reservoirs, and the diversion of waters of the public streams of said Territory, and have duly filed proof of its organization as a corporation, and its maps of survey of its proposed reservoir and canals, with the Secretary of

the Interior, and secured his approval thereof in accordance with the laws of the United States; and defendants asked that the various reports of the Geological Survey of the United States, and of the Secretary of the Interior, showing the survey of the Rio Grande, together with the various maps accompanying the same, and copy of the approved maps of the reservoir and canals at Elephant Butte, might be made a part of the plea.

The defendants in their answer to the bill of complaint admit their incorporation as alleged, and their purpose to construct a dam and reservoir at Elephant Butte, "but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation and Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same has long since been diverted, and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants have no property rights, and that neither one of the defendants are seeking or have ever sought to appropriate or divert by means or structures above referred to, or contemplated diversion by means thereof, of any of the waters of said Rio Grande usually flowing in the bed thereof, during the time when the same are usually put to beneficial use by those who have heretofore diverted the same, but, on the contrary, these defendants state that it has been their intention and their sole intention, by means of the structures which they contemplate, and which are complained of in said bill, to store, control, divert and use only such of the waters of said stream as are not legally diverted, appropriated, used

and owned by others, and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm, and flood waters thereof, now unappropriated, useless, and which go to waste."

The defendants deny that the river is susceptible of navigation or has been navigated above Roma, in the State of Texas, or "has at any times in the past been used beneficially for the purpose of floating or transporting rafts, logs or poles, or that any portion of said stream in said Territory of New Mexico is susceptible of being used and navigated for commercial purposes, and deny that the said river is navigable, or susceptible of being navigated for the purpose of carrying on commerce between the Territory of New Mexico and the State of Texas and the Republic of Mexico; they deny that their contemplated use of the waters of the river would deplete the flow of the water through the channel of the same so as to seriously obstruct the navigability of the same at any point below the proposed dam; deny that they are proposing to construct the dam and reservoir without due authority of law; deny that the navigability of the river at El Paso has been recognized by Congress, and deny the allegation that the contemplated dam and reservoir would be a violation of our treaties with Mexico.

To the plea and answer the plaintiff filed a general replication. The court thereupon issued a temporary injunction, and the defendants moved to dissolve the same, whereupon the court made an order for hearing to determine whether the injunction should be made permanent or dissolved.

It was conceded by the attorneys for both parties that

the court could take judicial notice of the character of the river as to whether the same was navigable or not. But for the enlightenment of the court on this point, counsel for both sides submitted a great mass of documentary information, consisting of maps, reports of exploring and surveying expeditions made by the War and Interior Departments, also reports of officers specially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation. (Op. of Court, Rec. 128.)

After a full hearing, consuming several consecutive days, the court ordered the injunction dissolved and the petition dismissed. (Order and Opinion, Rec. 124 *et seq.*) From this decree the plaintiff appealed to the Supreme Court of the Territory, where it was affirmed, and the case was then brought here.

Points in the Case.

There are six principal points in the case, which I shall state in the order in which I shall present them in argument.

1. Would the proposed dam and reservoir, if constructed, have been obnoxious to the requirements of the treaty of Guadalupe Hidalgo and subsequent treaties and conventions between the United States and the Republic of Mexico, or to international law?

2. Are the waters of the Rio Grande at or near Elephant Butte navigable waters of the United States in contemplation of the tenth section of the Act of Congress of September 17, 1890 (26 Stat. 454), or of the third sectection of the Act of July 13, 1892 (27 Stat. 110)?

3. If the river is not navigable at Elephant Butte, or within the boundaries of the Territory of New Mexico,

would the proposed dam and reservoir still be inhibited by said statutes from the fact, as alleged, that it is navigable for a short distance at or near its mouth?

4. Congress never had any jurisdiction over the non-navigable waters of the United States save as the same was incident to riparian rights attaching to public lands, and all such rights have been subordinated to the local laws and customs of the States and Territories.

5. The right to construct the proposed dam and reservoir had become vested in the defendants and could not be disturbed by this proceeding.

6. If the court should find an apparent conflict between the laws of the United States conferring jurisdiction upon the States and Territories over non-navigable waters, and those charging the Secretary of War with the protection of navigable waters, the construction, if possible, should be such as to continue in full force and effect those acts looking to the redemption and development of the arid regions of our country.

I.

Would our Treaties, or International Law, be Violated?

The Attorney-General quotes the 5th and 7th Articles of the Treaty of Guadalupe Hidalgo, and part of the 4th Article of the Gadsden Treaty, as bearing upon the point, but fails to reach any conclusion further than to raise the question whether our obligations under these would not require us to prohibit the works contemplated by the defendants.

There is nothing in the articles mentioned, nor in any other treaty or convention, that would warrant the contention of the Government in this regard. It is a fact that

this suit had its inception in similar claims asserted by the Government of Mexico through Minister Romero, on behalf of Mexican citizens residing on the right bank of the river below El Paso, and in his note addressed to the Secretary of State, Mr. Romero cited the articles mentioned by the Attorney-General, and in addition called attention to the requirements of Article 3 of the Convention of November 12, 1884, and of Article 5 of the Convention of March 1, 1889.

For the purposes of convenient consideration, I print here every article or clause bearing upon the matter in any treaty or convention between the two countries, including those cited by the Attorney-General and the Mexican authorities.

Treaty Guadalupe Hidalgo.

ART. 5. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the

said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

ART. 7. The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

9 Stat. 928, 929.

Gadsden Treaty.

ART. 4.—(Last clause.)

The several provisions, stipulations, and restrictions contained in the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio

Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty; that is to say, below the intersection of the 31 degree 47′ 30″ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe.

10 Stat. 1034.

Convention of November 12, 1884.

ART. 3. No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting water ways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid Commissions in 1852, or as determined by Article 1 hereof, and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

24 Stat. 1012.

Convention of March 1, 1889.

ART. 1. All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado Rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado River, or of

works that may be constructed in said rivers, or of any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions.

ART. 5. Whenever the local authorities on any point of the frontier between the United States of America and the United States of Mexico, in that portion in which the Rio Grande and the Colorado River form the boundary between the two countries, shall think that works are being constructed in either of those rivers, such as are prohibited by Article 3 of the convention of November 12, 1884, or by Article 7 of the treaty of Guadalupe Hidalgo of February 2, 1848, they shall so notify their respective Commissioners, in order that the latter may at once submit the matter to the International Boundary Commission, and that said Commission may proceed, in accordance with the provisions of the foregoing article, to examine the case, and that it may decide whether the work is among the number of those which are permitted or of those which are prohibited by the stipulations of those treaties.

The Commission may provisionally suspend the construction of the works in question pending the investigation of the matter, and if it shall fail to agree on this point, the works shall be suspended, at the instance of one of the two Governments.

26 Stat. 1513, 1514.

None of these treaty provisions deal with the Rio Grande except where it forms the boundary between the two countries. To avoid all possible doubt on this point, the last clause of Art. 7 of the Guadalupe treaty expressly provides that the stipulations contained therein should "not impair the territorial rights of either republic within

its established limits." Clearly, the obstructions inhibited were only those that might be built into the stream below the south line of New Mexico. "The navigation * * * of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right" of navigation. Then immediately the right of each party is reserved to exercise complete control over that portion of the river or any of its branches or tributaries lying within its own territory.

Art. 4 of the Gadsden Treaty again declares, in substance, that the mutual contracts between the two countries in this regard relate only to the river below the south boundary of New Mexico. And the understanding of the two countries as to what part of the river was referred to in the treaty of Guadalupe where it inhibits works that would obstruct navigation, is clearly defined in Art. 3 of the Convention of Nov. 12, 1884, *supra*. There the high contracting parties are certainly considering that part of the river that forms the dividing line between the two countries. They declare that no artificial change in the navigable course of the river, by building jetties, piers, *or obstructions* which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel, under the Treaty (of Guadalupe), &c., shall be permitted, &c.

A similar construction is given by Arts. 1 and 5 of the Convention of March 1, 1889, *supra*. That given in Art. 5 cannot be mistaken.

ART. 5. "Whenever the local authorities on any point of the frontier between the United States of America and the United States of Mexico, *in that portion in which the*

Rio Grande and the Colorado River form the boundary between the two countries, shall think that works are being constructed, in either of those rivers, such as are prohibited by Article 3 of the Convention of November 12, 1884, or by Article 7 of the Treaty of Guadalupe Hidalgo of February 2, 1848, they shall so notify their respective Commissioners," &c.

It seems quite clear, and even beyond the bounds of controversy, that these treaties and conventions can have no reference or application to obstructions, or proposed obstructions, in that part of the river that lies wholly within the territory of either party. The Attorney-General, after quoting portions of the treaties for some purpose, which is not wholly clear, seems, in a negative kind of way, to admit that they do not inhibit any use we may choose to make of the waters of the river within our own boundaries, and finally rests his argument on this point on the ground of "natural right." But in this connection we appeal from the present Attorney-General to his predecessor.

Requirements of International Law.

The whole question involved in the point now under discussion, was submitted by the Secretary of State to the Attorney-General by letter of November 5, 1895. This letter carried with it the written contention of the Mexican minister, and also suggested the inquiry whether "by the principles of international law, independent of any special treaty or convention, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande in the Mexican minister's note referred to, are violations of its rights," etc. The Attorney-General replied in an elaborate opinion (21 Op. Atty.-Genls.

274; See Appendix), in which he holds "that taking the water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico is not prohibited by the treaty." He also held that "the rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States." The whole opinion will be found in the Appendix.

The record discloses the fact that all agriculture in the valley of the Rio Grande in New Mexico depends upon the use of the waters of that river. That is a fact of which this court will also take judicial notice. The whole valley mentioned lies within the arid regions where there is not enough rain fall to produce crops. It has been cultivated solely by irrigation for more than two hundred years, as appears historically. The remains of ancient ditches indicate extensive irrigation by the natives in prehistoric times. The Mexican authorities well knew this when we acquired the territory. They knew that the use of these waters was absolutely necessary to sustain the life of the people. In arid countries where people exist, the water bears the same relation to them as does air and light. They cannot live without it. And in this valley when it was acquired from Mexico there were local laws and customs regulating the use of the streams and other sources of water supply. Rights in the use of the waters of the river had long since vested in the Mexican citizens found there. They owned their ditches (acequias) and the right to fill them. They also had the right to

construct other ditches without limit, except the limit of the water in the stream. Article 8 of the treaty (of Guadalupe) specially provided for the protection of the property rights, of all kinds, of the people found in the ceded territory. It is also clear from the record that the water found in the natural flow of the Rio Grande through New Mexico is insufficient for cultivating all the tillable soil. Under these facts it would be a curious application of the principles of international law, or the comity of nations, or the doctrine of natural rights, to deprive our own citizens of the means of life that it might be bestowed upon the citizens of another country. There is no authority which directly or indirectly requires this. The loose and somewhat vague rules asserted by authors as governing the *navigation* of international rivers, where they are navigable in both jurisdictions, have no application here. No authority has been found that holds that the proprietary country may not make any use of the stream within its own territory that was necessary to maintain the comfort or life of its inhabitants. If this be not true, then the lower country would have control of the lives and property of the upper country. But "the fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory."

If then our treaties with Mexico put us under no obligations to furnish it with water which is gathered wholly on our own soil, for its use, either for navigation or agriculture, certainly no law of nations or law of right calls upon us for such a sacrifice. Humanity, common sense, national self preservation, all cry out against it.

II.

Are the waters of the Rio Grande at or near Elephant Butte navigable waters of the United States in contempla-

tion of the 10th section of the act of September 17, 1890 (26 *Stat.* 454), *or the 3d section of the act of July* 13, 1892 (27 *Stat.* 110)?

The district judge before whom the case was originally tried decided this point in these words: "The Rio Grande is not a navigable river in New Mexico." (Rec. 134.) This judgment was reached after counsel on both sides had conceded that the court could take judicial notice of what were navigable rivers, and after there had been submitted to him for his enlightenment a great mass of documentary information in the shape of maps, reports of exploring and surveying expeditions made under the War and Interior Departments of the Government, and also reports of officers specially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation. (Rec. 128.) The court also had before it the affidavits of a number of living witnesses who were familiar with the stream, and had been for many years, and who, with one or two exceptions, testified that it was not navigable for any useful purpose. Most of them express astonishment that the question could be seriously raised. The point at which defendants propose to build the dam is within the judicial district of the judge who rendered the decision. In fact, a large part of the river within the Territory lies in that district. It is to be presumed that he had personal knowledge of the stream, its characteristics and possibilities. And after having his knowledge reinforced and enlightened by the maps, reports, etc., he characterized the stream as follows:

"The course of the Rio Grande in New Mexico is through rocky cañons and sandy valleys; in the valleys it spreads out, shallow and between low banks; over fine,

light, sandy soil of great depth; bars are continually forming, passing away and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile and the changes in its course are rapid, continual, and often radical; the valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently, when some telegraph poles were floated from La Joya a 'short distance.' 'The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels; and apparently a large percentage of the water is lost in these great deposits of fine material.' (12 Annual Rept. Geol. Sur. 204.) 'From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during the few weeks of the year and a small stream during the remainder of it.' (10 Annual Rept. Geol. Sur. p. 99.) 'From personal observation, I know that these seasons of flood and drouth (in Rio Grande) were of about the same character 30 years ago.' (Maj. Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., Vols. 3 and 4, p. 39.) But what is of more importance, we have reports of officials upon the exploration of the river made under the direction of the Government for the special purpose of considering its navigability. From these it appears: 'The stream is not now navigable, and it cannot be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks and the small discharge, do not encourage the belief that such improvement would be financially,

even if physically, practicable. Certainly there is no public interest which would justify ths expenditure of the many millions of dollars which such improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment the stream is not worthy of improvement by the General Government.' (Report of O. H. Ernst, Major of Engineers, to Secretary of War, 1889.) Again: 'I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. During the greater part of the year when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow channel with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable.' (Report of Gerald Bagnall, Assistant Engineer, to Secretary of War, 188?). Rec. 129, 130, 131.

The Supreme Court of the Territory in its unanimous opinion, announced by its Chief Justice, after examining the question of the navigability of the river, makes the following declaration :

"It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand, it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the centre of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly two hundred years, by which the river has been

obstructed and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by any one as to interference with any use of the river for purposes of navigation." (Rec., p. 5 of Opinion of Sup. Court.)

Thus the two lower courts, whose territorial jurisdiction covers the whole of that portion of the Rio Grande located in New Mexico (a distance of 700 miles), have found, as a question of fact, that it is not navigable above El Paso. How far this finding is binding upon this court, I shall not stop to argue. I note, however, that the finding was by the consent of both parties. But if the fact thus found should not be considered *conclusive*, it at least will, I am sure, be given great weight. The three Supreme Court judges who joined in the opinion live in New Mexico. Judge Bantz, the district judge (who is now dead), had lived in the Territory for many years. They were all better qualified to pass upon the question upon their own notice than a stranger who was unfamiliar with the history of the river and the situation on the ground. And in each case their individual knowledge and observations were supplemented by official reports of actual surveys and measurements. It is difficult to conceive how such a fact could be more completely and conclusively found.

I am aware that the Attorney-General, as "Point 5" of his brief, has declared that the court erred in holding that the Rio Grande River is not a navigable stream above El Paso. But his argument here rests upon two points, both of which it seems to us, with due deference, are fallacious. First, it is alleged, in substance, that the bill of complaint declared the river navigable from a point above Elephant Butte to its mouth; that by the pleadings issue was joined upon this question of fact; but "that this issue was not

tried, the court taking judicial notice of a disputed fact, decided it on a motion upon which the truth of all complainant's allegations of fact was, by the rule of pleading and procedure, admitted." Second, it is urged that the disputed fact of navigability in this case was of such character that the court could not determine it by taking judicial notice.

As to the first position, it is error to say that "the bill of complaint alleges, as a matter of fact, the navigability of the river from a point above Elephant Butte to its mouth." The only clause that approaches such an allegation is section 6 of the amended bill. (Rec. 18.)

"6. The complainant further alleges that said river is navigable and has been navigated by steamboats up to the town of Roma, in the State of Texas, about three hundred and fifty miles from its mouth, and is susceptible of navigation and has been navigated above Roma to a point about one hundred and fifty miles below El Paso, in the State of Texas. The complainant further alleges that the navigability of said river is interfered with at the last-mentioned point by some falls or rapids, and that the said river above said falls or rapids is susceptible of navigation up to La Joya, in the Territory of New Mexico, about one hundred miles above Elephant Butte, where defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya has at different times been used for the purposes of floating and transporting rafts, logs, and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes. And the complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico."

By a careful reading of this clause, it will be seen that

it does not bear the construction given it by the learned counsel. The first part of the clause alleges definitely that the river is navigable from its mouth to Roma. Above Roma to "some falls," which are 150 miles below El Paso, the allegation is, that the river "is susceptible of navigation and has been navigated." From the latter point to La Joya, 100 miles above Elephant Butte, the allegation is that the river "is *susceptible* of navigation," and "has at different times been used for the purposes of floating and transporting rafts, logs and poles, and that the said portion of said stream is *susceptible* of being *used* and *navigated* for *commercial purposes*." "And complainant further alleges that the said river is navigable and susceptible of being navigated *as aforesaid* for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico."

Clearly the allegations are that the river is navigable to Roma; was at one time navigated above that to "some falls," and is *susceptible* of being navigated over this section again; and while it has never been navigated above "some falls" to La Joya, yet it is susceptible of being navigated over this section for commercial purposes.

That is, the pleader laid out the river, for his purposes, in three sections, the first of which he declares to be navigable; the second, once navigable and could be made so again, the third never was navigable but is susceptible of being made so.

There is a vast difference between a navigable river and one *susceptible* of navigation. The pleader knew this. Where the river is navigable he said so. He knew where it was not navigable and took good care not to say it *was* navigable at such places. A thing is *susceptible* when it is capable of having something added to it. A man is susceptible of a headache when he is quite free from it;

a body is susceptible of being made white when it is perfectly black. It is just possible that by the expenditure of millions the Rio Grande could be made navigable over the stretches described; although one of the Government engineers who surveyed the river in New Mexico under special directions to determine its navigability, declares that in his belief it would be both financially and physically impossible to make it navigable. (Report of Maj. O. H. Ernst, quoted in Rec. 130.) But the question is, does the bill of complaint declare the river navigable in New Mexico? It clearly does not, and the District Attorney who drew it did not intend to make the allegation. He knew of the dam at El Paso, 200 years old; and of all the other facts found by the District and Supreme Courts which make it impossible to truthfully allege navigability. And no proper interpretation can be given his language touching this point other than he meant to say that the river above El Paso could, by sufficient expenditure of money and labor, be made navigable. In fact, the two bills of complaint, properly interpreted, are an admission that this part of the river is not now navigable, and never was navigable, except that at some time in the past tense it "had been used for the purposes of floating and transporting rafts, logs and poles," but carefully adds in the same sentence, and immediately following: "and that the said portion of said stream is *susceptible* of being used and navigated *for commercial purposes.*"

The amended bill was made and sworn to by the U. S. District Attorney, Mr. Childers. In his affidavit he gives his own interpretation of the allegations of the bill concerning the navigability of the river above the "some falls" point. After stating positively that the river is navigable "for a considerable distance above its mouth," the affidavit proceeds: "Affiant further states that he has

been reliably informed and believes that said river has been used above said point ["some falls"] in the past for the purpose of floating logs down the stream to the city of El Paso, and that he is informed and believes that said river has been recently so used for floating telegraph poles for a short distance a little below the town of La Joya." (Rec. 22.) Mr. Childers also filed in the case, and apparently at the same time he filed the amended bill, the affidavit of Anson Mills, a Government engineer on special duty as Mexican Boundary Commissioner, and who deposes that forty years ago he was engaged as an engineer and surveyor in the vicinity of El Paso, and "that in 1858 he, with a party, constructed and floated a raft of logs from a point known as El Canutillo, above El Paso, Texas (a distance of 12 miles), down to El Paso, for building purposes, and that he is informed and believes that the same has been done by many other parties about that time, the names of whom he is now unable to remember; and that recently a party constructing the Postal Telegraph Company's line used the river's current for floating their telegraph poles down the river at a point near La Joya, New Mexico."

The information, then, that the pleader had touching the navigability of the stream above El Paso, was that forty years ago a raft was floated from a point twelve miles above El Paso down to that town—of course, stopping above the old dam—and that "recently" some telegraph poles were floated a short distance near La Joya. Col. Mills' affidavit is dated the 23d of June, and "recently" would be about the time of the spring floods. The poles were probably floated the "short distance" by aid of the flood waters.

These two affidavits clearly indicate what Mr. Childers meant in the sixth clause of his bill when he sums it up

in the last sentence by saying "that the said river is navigable and susceptible of being navigated *as aforesaid*." That is, it was navigable where he had theretofore said it was navigable, and was susceptible of being made navigable in other portions. Hence, whatever may be the effect of the technical rule of pleading and procedure evoked by the Attorney-General, there has been no admission thereby of navigability in New Mexico, because it is not alleged.

But in addition to this the record shows that by the plea and answer the question of navigability was put in issue, and the case was actually heard on that issue. The method of finding that fact can cut no figure. The court journal (Rec. 118) states that the case was heard upon the order to show cause why the temporary injunction should not be continued in force, and upon respondent's motion to dissolve the same.

The motion to dissolve the injunction and dismiss the bill was made upon the filing of the plea and answer, and practically as part of the same. (Rec. 156.) The issue was, by complainant's replication, fully joined on bill and answer, and it was, as a matter of fact, upon this joinder that the case went to hearing, the only important question being the navigability of the river in New Mexico; and this question was tried out in one of the legitimate ways of trying such questions, and the fact having been found adverse to the allegations of the bill the decree properly followed.

Judicial Notice.

The second point made by the Attorney-General under this head was that the court could not determine navigability by taking judicial notice. It occurs to me that this contention is fully met by the decision of this court in *United States* v. *Steamer Montello* (11 Wall. 411; Bk. 20

L. Ed. 191). Mr. Justice Field, in announcing the opinion of the court, uses this language:

"We are supposed to know judicially the principal features of the geography of our country, and, as part of of it, what streams are public navigable waters of the United States. Since this case was presented we have examined with some care such geographies and histories of Wisconsin as we could obtain from the Library of Congress, to ascertain, if possible, the real character of Fox River, and to render the fiction of the law, as to our supposed knowledge of the navigable streams in that State, a reality in this case; but from such examination we are still in doubt whether Fox River has any such connection with other waters as to form wi h them a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

When this case of the *Montello* came here a second time (87 U. S. 430; Bk. 22 L. Ed. 391), the court again, upon its own motion, took notice of the character of the Fox River, quoting in its opinion Parkman's Discovery of the Great West, Bancroft's History of the United States, and Smith's History of Wisconsin.

In *U. S.* v. *Lawton* (5 How. 10; Bk. 12 L. Ed. 27) the court says: "A river which is one of the principal objects in the geography of a country may be judicially noticed."

In *Peyraux* v. *Howard* (7 Pet. 324; Bk. 8 L. Ed. 700): "This court takes judicial notice of the fact that the tide ebbs and flows at New Orleans."

In *Hilliker* v. *Coleman*, the Supreme Court of Michigan (41 N. W. 219) held: "The court can take judicial notice that the natural water-courses in the State have all decreased in volume, and many of them been dried up by the cultivation and clearing of the country."

"Judicial notice may be taken by Massachusetts courts that the Connecticut River, above the dam at Holyoke, doet not, either by itself or by uniting with other water, constitute a public highway over which commerce may be carried on with other States or with foreign countries." (*Commonwealth* v. *King*, 5 L. R. A. 536; 150 Mass. 221.)

Further see: (Olive *v.* State, 86 Ala. 88; Ross *v.* Faust, 54 Ind. 471; Thurman *v.* Morrison, 14 B. Mon. (Ky.) 296; and Lands *v.* A Cargo of Coal, 4 Fed. Rep. 478).

These authorities fix the rule. The courts in this country may take judicial notice to determine for themselves whether a stream, or other water, is navigable or non-navigable, and may examine geographies, histories, reports, maps, &c., to ascertain, if possible, the real character of such waters, "and to render the fiction of the law * * a reality."

The question then recurs, whether, the courts of the vicinage, having the best opportunity and facilities for doing so, and having found the fact, the appellate court should not allow such finding to stand. As this case is here on appeal of course the whole record is before the court for review, but both parties having voluntarily submitted this question of fact to the lower court should in equity be held to abide by the finding.

But should the court determine to examine into the fact of the navigability of the Rio Grande at Elephant Butte, or within the boundaries of the Territory of New Mexico as contemplated by the Statutes of the United States, we confidently appeal to the abundance of information on that point.

The statutes invoked are as follows:

Act of 1890.

SECTION. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any obstruction, except bridges, piers, docks and wharves, and similar structures erected for business puposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

26 Stat. 454.

Act of 1892.

SEC. 3. That Section 7 of the River and Harbor Act of September nineteen, eighteen hundred and ninety, be amended and re-enacted so as to read as follows:

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor line, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War.

"*Provided:* That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments or other works under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable waters not wholly within the limits of such State."

27 Stat. 110.

These statutes only profess to deal with "the navigable waters of the United States," or the navigable waters "in respect of which the United States has jurisdiction." Unless the Rio Grande at Elephant Butte can be held as *such waters*, then the decree below should be confirmed.

The non-navigable waters of the United States, and the navigable waters that belong wholly to the individual States, are not included in these enactments.

This court has left no room for reasonable doubt as to what are navigable waters of the United States over which the United States may have jurisdiction. In *The Daniel Ball* v. *United States* (77 U. S. 557; Bk. 19 L. Ed. 1001), the court says:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

This definition is quoted and approved by the Court in *United States* v. *The Montello* (87 U. S. 430; Bk. 22 L. Ed. 391). Justice Davis, who rendered the opinion in that case, also quotes with approval the words of Chief Justice Shaw in *Rowe* v. *Bridge Co.* (21 Pick. 344), as follows: "It is not, however, every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." And after some further discussion Justice Davis adds: "The vital and essential point is whether

the *natural navigation* of the river is such that it affords a channel for *useful commerce.*"

It is clear from the definition given in The Daniel Ball, that rivers over which the United States has jurisdiction under the federal laws must: 1st. Be navigable in fact; 2nd. Must be used, or be susceptible of being used in their ordinary condition, as highways for commerce, and this commerce must be such as is conducted in the customary modes of trade and travel on water; 3d. They must form in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which such commerce is or may be carried on with other States or foreign countries in the *customary modes* in which commerce is conducted by water. That is, they must be navigable waters crossing some State or international line.

The learned Justice, with his usual lucidity of statement, has left nothing to conjecture.

No stream which comes roaring down its course for a few weeks each year, although it should carry at such times sufficient water to float an ocean-going steamer, but is non-navigable in its *ordinary condition*, will fit into the definition.

No stream which is capable only of carrying a few poles or logs at certain seasons will answer.

It must bear upon its waters, or be capable of so doing, trade and commerce conducted in the customary modes of trade and travel on water.

It must be a river whose navigable waters are not wholly inside of any one State.

It must by itself, and in its ordinary condition, or by uniting with other waters, form a continued highway, for just such commerce as is described, between our own States, or between our country and some foreign country.

It is not a river or stream that simply *carries water to a navigable river.* It must of itself be navigable in fact.

It is not a river or stream that cannot *now* be navigated, but might possibly be made navigable by enormous expenditure. It must be capable of useful commerce *in its ordinary condition.*

This is the sense also in which the bulk of our courts in this country define navigability:

"A fresh-water stream having the requisite volume of water only occasionally as the result of freshets, and for brief periods, is unnavigable and private property." Morrison *v.* Coleman, 87 Ala. 655.

"Waters of a river which can be used by vessels only for the transportation of persons and property between different places in the same State are not within the maritime jurisdiction of the United States." Com. *v.* King, 150 Mass. 221.

"To make a stream navigable, there must be some commerce and navigation upon it which is essentially valuable." Woodman *v.* Pitman, 79 Me. 456, and authorities there cited.

"A fresh-water stream above tidewater is not public and navigable where it has never been utilized for transportation except for saw-logs and lumber at occasional periods during freshets in the spring or winter, and its depth does not fit it for such transportation for any considerable part of the year, and it is not shown to be exempt from the public surveys of the government as a public stream, or declared to be such by the State legislature." Bayzer *v.* McMillan Mill Co. (Ala.), 16 So. 923.

"A waterway lying wholly within a State, and not connected with other waters leading to the sea, is not navigable, under the laws of the United States." Hodges *v.* Williams, 95 N. C. 331.

"Where the entire portion of a navigable river is included within a single State, the part so enclosed is undoubtedly the property of such State." 1 Halleck Int. Law (by Baker), 146. Horton's International Law, vol.

1, par. 30, foot page 97. Also see—Goodwill *v.* Bosier Parish, &c., 38 La. An. 752; Heyward *v.* Farmers Min. Co. (S. C.), 19 S. E. 963; Fulmer *v.* Williams, 122 Pa. 191; State *v.* Narrows Island Club, 100 N. C. 477.

The act of Congress of September 19, 1890, prohibiting obstructions in navigable waters, and the act of July 13, 1892, making it unlawful to build dams, &c., in navigable waters without the permission of the Secretary of War, both relate solely to the character of navigable waters as defined in The Daniel Ball. It is true that neither of these statutes had been enacted when The Daniel Ball case was decided. But Congress had theretofore enacted many laws to regulate commerce and transportation on the navigable waters of the United States. It was for the enforcement of the act of July 7, 1838 (5 Stat. 304), as amended by the act of August 30, 1852 (10 Stat. 61), that the suit was brought against The Ball. Those statutes provided for the license and inspection of vessels engaged in trade "upon the bays, lakes, rivers, or other navigable waters of the United States." The issue turned upon the question: What are the navigable waters of the United States? The answer given by this court fixed the law in this regard. The laws of 1890 and 1892 were made with reference to that definition. The statutes under consideration in The Ball case use the phrase, "navigable waters of the United States," the act of 1890 "navigable capacity of any waters in respect of which the United States has jurisdiction," and the act of 1892 repeats the phrase of 1838 and 1852, "any navigable waters of the United States."

It is safe then to assume that the law as to what are navigable waters of the United States is found in *The Daniel Ball* and subsequent decisions.

The record clearly discloses that there are no such

waters in the Rio Grande in New Mexico, or for many hundred miles below El Paso. So far as this question of facts rests on proofs presented to the lower court by the complainant, it is all summed up in the following:

1. The small steamer "Bessie" is now plying with difficulty between the mouth of the river and Camargo, a distance of 250 miles, Camargo being 1,175 miles below Elephant Butte.

2. That in "former years" there was steam navigation of some kind as far up as Roma—a distance of 300 miles.

3. That, in 1852 to 1855, Major Emory carried some small boats "to a point about 100 miles above the mouth of Devils River," say 600 miles below Elephant Butte.

4. That at some date not mentioned, Capt. Love reported that he had "carried a small boat up the river to within 150 miles below El Paso." [But this, in the opinion of Col. Mills, is a mistake, and the statement should be, one hundred and fifty miles below Presidio del Norte, which is about 400 miles below El Paso, and 525 miles below Elephant Butte.]

5. That, in 1858, a raft of logs was floated from El Canutillo to El Paso—12 miles.

6. That recently some telegraph poles were floated a short distance near La Joya. (Rec., pp. 59 and 60.)

Thus throughout the whole stretch of the river from the northern boundary of New Mexico to Camargo, a distance of 1,750 miles, there has only been a single attempt in 40 years to use its waters for navigation; and this consisted in floating some telegraph poles (no one knows how many), a short distance (no one knows how far.)

To set over against this there appears in the record proofs tending to show the following:

1. That the bed of the river, outside the cañons, is such as to preclude navigation—there not being sufficient water in the ordinary stage, and during the floods it spreads out, forms bars, changes channel, &c.

2. The fall is from four to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical.

3. That the Director of the Geological Survey (12 An. Rpt. 204) alleges that "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divides into a number of minor channels; and, apparently, a large percentage of the water is lost in these great deposits of fine material." Again, in 10 An. Rpt. 99,—"From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year, and a small stream during the remainder of it."

4. Colonel Mills, on whose statement the whole case for the Government rests, also says, in speaking of the condition of the river, as the same is described by Major Powell, of the Geological Survey:

"From personal observation, I know that these seasons of flood and drouth were of about the same character 30 years ago."

And in his letter to the Secretary of State of January 7, 1897, in alluding to the fact that he had in 1859 (1858) floated a raft from El Canutillo down to El Paso, he says:

"By reason, however, of the depletion of the water, it would now hardly be practicable to do so."

5. Major O. H. Ernst, an engineer of the War Depart-

ment, explored the river in 1888, 1889, under directions to ascertain its navigability, and reported as follows:

"The stream is not now navigable, and it cannot be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks and the small discharge, do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment the stream is not worthy of improvement by the General Government."

6. Asst. Engineer Gerald Bagnall reported to the Secretary of War in 1889:

"I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. * * * During the greater part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel except perhaps a narrow canal with locks, the construction of which, on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable."

7. There is a dam across the stream at El Paso that has stood for 200 years. (Rec. p. 5, Op. Sup. Ct. N. M.)

8. The sworn statements of nine citizens of New Mexico, all of whom testify that they are acquainted with the character of the river, their acquaintance covering periods varying from 17 to 49 years and averaging over 30 years. Two of these witnesses are surveyors and civil engineers,

one having been employed as engineer by the Government since 1880. They each declare that the river in New Mexico has not at any time during his acquaintance been navigable or navigated, so far as he knows, for any purpose.

Mr. Gillett, who has been intimately acquainted with the Rio Grande at El Paso and points above for 49 years, declares that from 1849 to 1862 or 1863, while he lived at El Paso, the stream at that point was the same in all its essential features that it is now; that practically during each year from 1849 to 1862 the river at El Paso was dry, and when not dry there would be a small amount of water passing—"possibly only two feet deep and from thirty to fifty yards wide." That there was an old Mexican dam just above El Paso, "which would have absolutely cut off all navigation," and that the dam had been there "from the time whereof the memory of man runneth not to the contrary;" that if Col. Mills floated a raft down from El Canutillo in 1858, it must have been during the high-water period, and the logs were "nothing more than small cotton-wood polls, because that was the only kind of timber that ever has been grown near said place."

Mr. Watts has known the river in New Mexico for 34 years. He says he is able to state from his thorough knowledge of the stream, "that neither trees nor raft nor boats have ever been floated by the people for pleasure or commerce in New Mexico upon its waters, except that some lone instance may have occurred where for a short distance the same could have been floated, or in some unusual flood some venturesome person may have undertaken to go down the same in a boat; that affiant has heard of such instances, but never heard of one except where the party thus attempting to navigate the stream

came to grief; that it is practically now in the same condition that it was when he first became acquainted with it in 1864."

Dr. Kennon has known the river intimately for 45 years; that its general characteristics now are the same as in 1853; "that the same is not and never has been a navigable stream in New Mexico, or capable or susceptible of being navigated; that it has never been beneficially used by the people in New Mexico for commercial purposes, and is incapable of such beneficial use by reason of its rapids, its quicksands, sand bars, shifting banks, and lack of water."

James Brent has known the river for 17 years and entirely corroborates Dr. Kennon, saying, among other things: "Affiant further says that even in its highest floods it would be impossible for a boat to navigate the same; that there is no timber along its banks which can be floated thereon."

Mr. Hudson, a former volunteer officer of the army, has been acquainted with the river since 1863 (35 years), and declares in substance that the only beneficial use that has been made of its waters is for agricultural purposes, adding: "It is incapable of being used for beneficially floating logs on account of the sand bars in its channel and the difficulty of keeping such logs in the water—even if there was any timber along its banks, which affiant states there is not at any point within the Territory of New Mexico, and that if anybody ever floated rafts in the same, such rafts must have been comprised of small cottonwood trees, or small underbrush, and must have been inspired with the desire of achieving the impossible, than to accomplish any beneficial purpose."

John D. Ball shows that he has been particularly familiar with the stream in New Mexico for 30 years,

and declares "that it is not capable in its natural condition of being put to any beneficial uses as a highway for commerce or for pleasure; that even during its flood times he never has known it to be navigated or put to any useful purpose, and in his opinion it is, even at such periods, incapable of being navigated."

James T. Reed is a surveyor and civil engineer, who for 18 years has been engaged in making surveys for the United States and for private persons, and is acquainted with the river from Fort Quitman, seventy-five miles below El Paso, up to Albuquerque. He declares it unnavigable and incapable of being navigated, and that during his acquaintance it has not been navigated between the two points mentioned. In 1880 he traveled from Fort Quitman to El Paso, and between the former place and Fort Rice he had to dig in the bed of the stream to get water for himself and his animals.

Ricard L. Powell is another surveyor who has been employed by the United States since 1880, and acquainted with the Rio Grande during that time. His work has given him peculiar advantages to thoroughly know the river. He fully corroborates the others, and declares "that such a thing as a steamboat or raft ascending or descending its channel in New Mexico during flood season is impossible, and would be considered absurd by any of the people living along its course."

John M. Ginn for 28 years has been familiar with the river in its entire course in the Territory:

In its general character and condition it is the same to-day as when he first became acquainted with it, that it is a dangerous, treacherous, sand bar, quicksand stream, never has been navigated or capable of navigation during the period affiant has known it, and has, during such entire time, been incapable of navigation, that he has

drank the waters of the River, has been swallowed up in its quicksands, and has for years gazed at its ugly and tortuous current and been impressed with its ugliness and utter uselessness except for purposes of irrigation; affiant further says that even in its highest floods it is incapable of navigation, and that if as stated in the affidavit of Brigadier-General Mills in this case steamboats could ascend for a hundred miles above El Paso, that verily, in the opinion of this affiant, they could only do so by the aid of wings.

9. The reports of the Director of the Geological Survey show the stream valueless, except for irrigating the arid soil.

10. The Secretary of the Interior, in pursuance of acts of Congress, designated a number of reservoir sites for purposes of irrigation on the river in New Mexico, one being located immediately above Elephant Butte and another below that point, either of which, if constructed, would probably require as much water from the river as the reservoir contemplated by the defendants, and neither of which can be supplied in any way without damming the river.

The river within New Mexico not being in fact navigable as contemplated by sec. 10 of the act of 1890, or sec. 7 of the act of 1892, we proceed to our third inquiry.

III.

If the river is not navigable at Elephant Butte or within the boundaries of the Territory, would the proposed dam and reservoir still be inhibited by said statutes from the supposed fact that it is navigable for a short distance at or near its mouth?

It is exceedingly doubtful whether the waters, carried

by the river in its course above El Paso, contribute now, or ever did contribute, to the navigable capacity of the stream from its mouth to Camargo or to Roma. The 700 miles of the river lying between the north and south boundary lines of New Mexico are almost wholly through sandy, arid soil. The evaporation and seepage are great. The evaporation from a pond is said to be 6½ feet off the surface in a year. It is pretty clear, at least, that only the storm or flood water gets into the stream below El Paso. At that point, outside the flood season, the water is very low or the bed of the stream entirely dry, and there is an ancient dam entirely across it. So that for purposes of navigation it is plain that the stream in New Mexico, in its ordinary condition, contributes nothing, or an extremely small amount, to the waters below El Paso.

This leaves only the flood waters to be considered. Now, such flood waters as pass the dam at El Pase, during the few days they are pouring down the river, have 1,000 miles to flow before they reach Roma, the extreme upper point to which steam navigation ever reached, and which point is now 50 miles above the most strenuous efforts of the little *Bessie*. I cannot believe that the court will find, either upon its own notice, or from anything in the record, that *any* of the waters of the river gathered upon the Territory above El Paso contribute to the navigable capacity of the river where it may be navigable. And there is reason for the gravest doubt whether the Rio Grande is navigable at any point from source to mouth, within the definition in *The Daniel Ball* case.

But even if it should be found navigable *in the ordinary method for useful commerce* for a short distance below Roma, and it should be conceded, for the purposes of the argument, that the waters in New Mexico contribute to its navigability, yet we contend earnestly that these things do

not give the Secretary of War jurisdiction over the non-navigable portion of the stream, and that an obstruction of the water where it is not navigable is not prohibited by the statutes. The obstructions prohibited are those built or to be built "in any navigable waters," &c., or in waters "in respect of which the United States has jurisdiction." Now, this court says explicitly that that kind of water must be navigable in fact. "To build in," must mean *to build into.* The construction sought by the Attorney-General would practically give the Secretary of War jurisdiction over every creek and stream and pond in the United States, as they all connect, sooner or later, with waters that are navigable.

Again, the act of 1890, on which the complainants more particularly rely, only assumes to prohibit obstructions "not affirmatively authorized by law." Our contention is that the dam we proposed to erect was explicitly authorized by law, and is to be placed in waters in respect of which the United States has no jurisdiction whatever.

IV.

Congress never had any jurisdiction over the non-navigable waters of the United States save as the same was incident to riparian rights attaching to public lands, and all such rights have been subordinated to the local laws and customs of the States and Territories.

As early as 1866, an act was passed entitled, An act granting the right of way to ditch and canal owners over the public lands, and for other purposes, section 9 of which is now Sec. 2339 of the Revised Statutes, and reads as follows:

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufactur-

ing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (See 14 Stat. 252).

In 1870 Congress amended the whole act (16 Stat. 217) and added a clause which now forms Sec. 2340 of the Revised Statutes, as follows:

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Thus the question of the use of the non-navigable waters of the country was settled by legislation more than thirty years before the enactment of the statute placing the navigable waters, for certain purposes, under control of the Secretary of War.

The common law relating to riparian rights was not applicable to the condition of things found in the Western States and Territories, and the miners and those using the water of the streams for irrigation established the rule of *prior appropriation*, which came to be adopted by the local courts, and subsequently (1866) approved by Congress.

This court has given construction to that act in *Atchi-*

son v. *Peterson* (20 Wal. 507, Bk. 22 L. Ed. 414), and in *Basey* v. *Gallagher*, (20 Wal. 670, Bk. 22 L. Ed. 452). In the latter case the controversy related to the use, for the purposes of irrigation, of the waters of Avalanche Creek, near its junction with the Missouri River. See also *Jennison* v. *Kirk*, 98 U. S. 453, Bk. 25 L. Ed. 240, and *Brader* v. *Notoma Water, &c., Co.*, 101 U. S. 274, Bk. 25 L. Ed. 790. In this latter case Justice Field, delivering the opinion of the court, said:

"We are of opinion that it is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

After Congress had adopted the local laws and customs relating to the use of water for mining and agricultural purposes, it proceeded to enact a number of other laws intended to encourage the use of these waters to the fullest extent in redeeming the vast arid regions of the West.

Desert Land Laws.

In 1877 (19 Stat. 277, *Sup.* 2d ed., 137) is found an act entitled, An act to provide for the sale of desert lands in certain States and Territories. The proviso of the first section reads as follows:

"*Provided, however*, that the right to the use of the water by the person so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights."

This act is made specifically applicable to California, Oregon, Washington, Idaho, Montana, Utah, Wyoming, Arizona, *New Mexico*, and Dakota. Afterwards (1891) made applicable to Colorado.

March 20, 1888 (25 Stat. 618), Congress passed a joint resolution directing the Secretary of the Interior, by means of the Director of the Geological Survey, to investigate the practicability of constructing reservoirs for the storage of water in the arid region of the United States, and to report to Congress.

October 2, 1888 (25 Stat. 526), Congress provided for the survey and selection of sites for reservoirs necessary for irrigation and the segregation of such sites and the irrigable lands about them, and appropriated $100,000 for the purpose.

March 2, 1889 (25 Stat. 960), a further appropriation of $250,000 was made for the same purpose.

August 30, 1890 (26 Stat. 391), Congress repealed the act of Oct. 2, 1888, so far as it provided for reserving the irrigable lands about the selected reservoir sites, but continued the reservation of the selected sites.

March 3, 1891 (26 Stat. 1101), in an act entitled, An act

to repeal timber culture laws, &c., in sections 17, 18, 19, 20 and 21, was provided a system of procedure to procure the right of way for reservoirs and canals for purposes of irrigation.

Section 18 reads as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, *and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*

February 26, 1897 (29 Stat. 599), all reserved reservoir sites were thrown open to occupation by individuals and States under the provisions of the act of March 3, 1891.

January 21, 1895 (28 Stat. 635), an act authorizing the use of public lands for reservoirs and canals to the extent they may be occupied and for fifty additional feet on each side.

January 13, 1897 (29 Stat. 484), an act was passed entitled, An act providing for the location and purchase of

public lands for reservoir sites. This act specially provides for the acquisition of such sites by persons or corporations engaged in breeding stock, etc.

August 18, 1894 (28 Stat. 422), Congress provided for making over to certain States and Territories portions of the desert lands on conditions of reclaiming same by irrigation.

In addition to these statutes providing for the irrigation of arid lands generally, there has grown up under several enactments of Congress a most extended system of irrigation on the various Indian reservations. Large sums of money have been appropriated for the construction "of dams, canals, ditches, and laterals for the purposes of irrigation," etc. (26 Stat. 1040; 27 Stat. 627; *Ib.* 631; and 28 Stat. 900).

After the passage of the act of March 3, 1891, granting the right of way through the public lands and reservations of the United States for the use of canals, ditches, and reservoirs, upon the filing and approval of the certificates and maps as therein set forth, the Secretary of the Interior established and published regulations for the execution of the law. On page 8 of these regulations (1884) he uses the following language:

"This act is evidently designed to encourage the much needed work of constructing ditches, canals, and reservoirs in the arid portion of the country by granting a right of way over the public lands necessary to the maintenance and use of the same.

"The eighteenth section of the act in question provides that—

"'The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.'

"The control of the flow and use of the water is there-

fore a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands.

"In submitting maps for approval under this act, however, which in anywise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located."

V.

The right to construct the proposed irrigation plant, including the dam, had become vested.

There can be no misunderstanding as to what Congress meant by the system of laws relating to the disposition of desert lands and their cultivation by use of the water in the adjacent streams. Under these enactments, and the laws of New Mexico, the defendant, the Rio Grande Dam and Irrigation Co., acquired the right to construct its dam and reservoir at Elephant Butte. The construction was "affirmatively authorized by law."

A portion of the laws of the Territory relating to the acquisition and use of water for irrigation I have printed in the Appendix. It is a fact, of which the court will take notice, that the valley of the Rio Grande has always been cultivated solely by means of water diverted from the river. When the United States acquired the Territory the existing laws were continued in force, and these laws of the Mexican Republic, as they related to the use of water, were distinctly based upon the rule of prior appropriation. One of the first enactments of the Territorial legislature (see Appendix) provided that "no inhabitant of

said Territory shall have the right to construct any property to the impediment of irrigation of lands or fields, such as mills, or any other property that may obstruct the source of the water, *as the irrigation of the fields should be preferable to all others.*"

And the act of 1886, providing for the formation of corporations for the purpose of supplying water for irrigation, authorizes such corporations "to take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons," &c.

There is no question but what we have conformed to the laws of New Mexico, and under such laws, so far as they may control, are entitled to proceed with the construction of the dam and reservoir. Neither is it questioned that in securing the approval of the Secretary of the Interior to our articles of incorporation and our maps of location, we have complied with the laws of the United States in that regard.

Under this definite statutory authorization the defendants commenced to construct, and at the time they were enjoined had expended $150,000 in construction and expenses incident to construction.

VI.

If from any POSSIBLE *construction of the acts* 1890 *and* 1892, *giving the Secretary of War certain control over the navigable waters of the United States, they could be held in conflict with the statutes placing the control of the non-navigable waters in the States and Territories, the construction we contend for should be given, and the irrigation laws held intact.*

Enormous interests have grown up under these latter enactments. The census of 1890 shows that eight years

ago there were over 54,000 persons engaged in irrigation, and 3,564,416 acres were thus under cultivation. The average product per acre per annum was $14.89, giving a total of $53,074,000.

Practically every gallon of water utilized to produce this result was taken from a stream or lake that connected with navigable waters. It is not unlikely that since 1890 the area cultivated and the income from it have both doubled.

In New Mexico, at the time of the last censns, there were 3,085 persons employed in irrigation, cultivating 91,745 acres, the average product per acre being valued at $12.80.

The census returns the average value of irrigated lands as $83.28 per acre. This would give the value of the lands in the United States in 1890, which had been redeemed from utter worthlessness by irrigation, as $295,846,528, and the value of such lands in New Mexico as $7,614,955.

Not losing sight of the fact that there have been eight years of active development in this line since these figures were made, the court will have some conception of the great value of the present interest in irrigation. And the lands actually redeemed are only a fraction of those that may be cultivated if the use of water remains unlimited.

The Director of the Geological Survey, in his Tenth Annual Report (1888–'89), Part 2, has this to say:

"The area of the arid regions is about 1,300,000 square miles—one-third of the entire country. I judge that of this area there can be economically reclaimed, by irrigation, within the present generation, at least 150,000 square miles—an empire one-half as large as the entire area now cultivated in the United States. Irrigated, this land would be worth not less than $30 an acre, adding $2,880,000,000 to the wealth of the nation."

The Director states that under the authority of Congress he had during the years 1888, 1889 mapped out an area for reservoirs in New Mexico, equal to 6,370 square miles, and had actually surveyed and segregated 3,800 square miles, and that the total segregations of irrigable lands in the Rio Grande Valley at that time was 5,760,000 acres; and that the total number of acres segregated in the U. S. by the Government was 30,555,120.

Thus it is seen that one-sixth of the whole area set apart at that time by the Government for irrigation was in the valley of the Rio Grande.

On page 4 *Ib.* the Director says: "The region in which agriculture depends on irrigation includes about four-tenths ($^4/_{10}$) of the entire area of the United States, not including Alaska." "At the present time the greater number of the small streams are utilized for irrigation, so far as possible, without the storage of water; that is to say, the ordinary flow of water of the smaller streams during the season of growing crops is diverted by canals from the natural channels and served to the land. The future development of irrigation chiefly depends: First, on the utilization of the larger streams. These have heretofore been largely unused from the fact that great capital or extensive co-operative industry is required. Second, on the construction of storage basins. In most portions of the United States the season of growing crops is short compared with the entire year, and the greater part of the irrigation works heretofore constructed utilize the water only through the growing season, and the extra-seasonal water is allowed to run to waste. Third, on the construction of storm water reservoirs. Throughout the irrigable area of the arid region there are great numbers of catchment basins through which no perennial waters flow, but within which the storm waters may be gathered

and stored in reservoirs, to be utilized in the season of growing crops. Fourth, on controlling the entire flow of the smaller streams through the irrigating season. A portion of these waters now runs to waste."

The contention of the Attorney-General endangers this whole vast interest. If the Secretary of War may have injunction to stop the construction of a dam in a non-navigable stream, he may have every existing obstruction in such waters removed. If our dam is obnoxious to Sec. 10 and Sec. 7 of the Statutes, as alleged in the bill, then the hundreds of dams in Colorado across this same stream are equally obnoxious; all the irrigating plants in Montana and Wyoming and California are illegal and subject to being destroyed.

All this raises a question of which this Court has not been unmindful in somewhat similar cases. In *Escanaba Trans. Co.* v. *Chicago* (107 U. S. 678, Bk. 27 L. Ed. 442), the controversy related to bridges and bridge-piers constructed over and into the confessedly navigable waters of the Chicago River. This Court discussed the relative value to the public of having unobstructed passage across the bridges and having unobstructed navigation on the river, and announced that "the object of wise legislation is to give facilities to both, with the least obstruction to either."

In *Gilman* v. *Philadelphia* (70 U. S. 713, Bk. 18 L. Ed. 96), a similar view was taken, the Court declaring that it should not be forgotten that the commerce which passes over a bridge may be much greater than that conducted on the river. The river in this case also at the point of obstruction was navigable. The Court simply considered and found a way to protect the greater interest.

In the case at bar, admitting every claim made for the

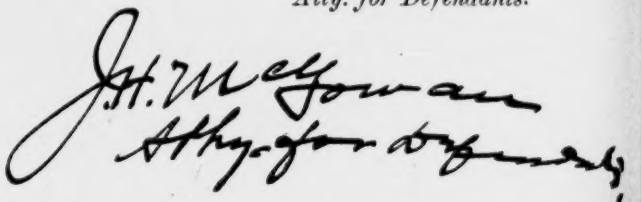
river, its navigability and commerce, it all sinks into utter insignificance in comparison with the interest that would be destroyed at Elephant Butte alone, to say nothing of the menace to all irrigation.

Certainly the construction of the acts of 1890, 1892, for which we contend, is a possible construction. It would, then, seem to be the province of the court to protect the citizens of our own country in the property which they have acquired under the encouragement of Congressional enactment and executive construction.

Conclusion.

In conclusion, I beg to call the attention of the court to the evidence in the record that this suit is not prosecuted for the purpose of protecting the navigability of the river. It is evidently an attempt to break down one irrigation scheme that another may be built up. A huge dam is to be constructed at El Paso for impounding all the waters of the river, making what is termed an "international reservoir." This for the benefit largely of the citizens of Mexico. This suit, in its inception, is a subterfuge to accomplish an entirely different purpose from that apparent on the face of the proceedings. For this I believe the Department of Justice is nowise responsible. But the facts are now patent on the face of the record (pp. 105 to 116); they have been commented on by the court below, and we feel warranted in raising the suggestion that the courts should not be used for such a purpose.

J. H. McGOWAN,
Atty. for Defendants.



APPENDIX.

LAWS OF NEW MEXICO RELATING TO IRRIGATION.

ACT 20, JULY, 1851.

Compiled Laws of 1865, page 18.

SEC. 2. No inhabitant of said Territory shall have the right to construct any property to the impediment of irrigation of lands or fields, such as mills, or any other property that may obstruct the source of the water, as the irrigation of the fields should be preferable to all others:

GENERAL LAWS OF NEW MEXICO, 1880.

Chap. 1, "Acequias."

SEC. 1. All the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can.

SESSION LAWS, 1886-7.

Chap. 12, pp. 29.

SEC. 1. Any five persons who may desire to form a corporation for the purpose of constructing and maintaining

reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water, for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith; for either or both of said objects, either jointly or separately shall make and sign articles of incorporation, which shall be acknowledged before the Secretary of the Territory, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with such Secretary.

Sections 2, 3, and 4 prescribed the details of what the articles of incorporation shall contain, and the last clause of Section 4 reads as follows:

"May purchase, acquire, hold, sell, mortgage and convey such real and personal estate as such corporation may require to successfully carry on and transact the objects for which it was formed."

SEC. 17. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in Sec. 1 shall have, in addition to the power hereinbefore mentioned, rights as follows:

1. To cause such examinations and surveys for their proposed reservoirs, canals, pipe lines and ditches, to be made, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents, and servants, to enter upon the lands or water of any person, or of this territory.

2. To take and hold such voluntary grant of real estate and other property as shall be made to them in furtherance of such corporation.

3. To construct their canals, pipe lines or ditches upon or along any stream of water.

4. To take and divert from any stream, lake, or spring, the surplus water, for the purpose of supplying the same to persons, to be used for the object mentioned in Sec. 1, of, this Act, but such corporation shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided: *And provided further*, That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.

5. To furnish water for the purposes mentioned in Sec. 1, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said corporations.

SESSION LAWS 1891, P. 130.

Be it enacted by the Legislative Assembly of the Territory of New Mexico:

SECTION 1. That every person, association or corporation hereafter constructing or enlarging any ditch, canal or feeder, for any reservoir, and taking water from any natural stream, shall within ninety days after the commencement of such construction, change or enlargement, file and cause to be recorded in the office of Probate Clerk of the county in which such ditch, canal or feeder be situated, a sworn statement in writing, showing the name of such ditch, canal, or of the reservoir supplied by such feeder, the point at which the headgate thereof is

situated, the size of the ditch, canal or feeder, both in width and depth, the carrying capacity in inches, the description of the line thereof, the time when the work was commenced, the name or names of the owners thereof, together with a map showing the route thereof, the legal subdivisions of the land, if on surveyed lands, with proper corners and distances, and in case of an enlargement or change, the depth and width, also the carrying capacity of the ditch so enlarged or changed, and the increased capacity of the same thereby occasioned, and the time when such change or enlargement was commenced, and no priority of right for any purpose shall attach to any such construction, change or enlargement until such record is made.

SEC. 2. A copy of such sworn statement duly certified by the probate clerk of the county where such record is made shall be admitted as *prima facie* evidence of such appropriation of water in all the courts of this Territory: *Provided*, That the provisions of this act shall not affect any existing vested rights or any public acequia or ditch used for the public, and the canals, ditches or acequias authorized by this act to be constructed shall be completed within five years from the time work shall be commenced on the same.

SEC. 3. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

Approved February 26, 1891.

OPINION OF ATTORNEY-GENERAL.

21 Opinions, 274.

TREATY OF GUADALUPE HIDALGO—INTERNATIONAL LAW.

Article VII of the treaty of February 2, 1848, between Mexico and the United States, known as the treaty of Guadalupe Hidalgo, is still in force, so far as it affects the Rio Grande.

The taking of the water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico, is not prohibited by said treaty.

Article VII is limited in terms to that of the Rio Grande lying below the southern boundary of New Mexico, and applies to such works alone as either party might construct on its own side.

The only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. Claims against the United States by Mexico for indemnity for injuries to agriculture alone, caused by scarcity of water resulting from irrigation ditches wholly within the United States at places far above the head of navigation, find no support in the treaty.

The rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States.

The fact that there is not enough water in the Rio Grande for the use of the inhabitants of both countries for irrigation purposes, does not give Mexico the right to subject the United States to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied, entirely within its own territory. The recognition of such a right is entirely inconsistent with the sovereignty of the United States over its national domain.

DEPARTMENT OF JUSTICE,
December 12, 1895.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th ultimo in which you refer to the concurrent resolution of Congress passed April 29, 1890, providing for negotiations with the Government of Mexico with a view to the remedy of certain difficulties mentioned in the preamble to such resolution, which arise from the taking of water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico. I have also the copy which you enclose of the note of the Mexican minister to yourself, dated October 21, 1895, in which he states at length the position taken by his Government.

You say: "The negotiations with which the President, acting through the Department of State, is charged by the foregoing resolution cannot be intelligently conducted unless the legal rights and obligations of the two Governments concerned and the responsibility of either, if any, for the disastrous state of things depicted in the Mexican minister's letter, are first ascertained.

"I have the honor, therefore, to call your attention to the legal propositions asserted in Mr. Romero's letter and

to inquire whether, in your judgment, those propositions correctly state the law applicable to the case—in other words: (1) Are the provisions of article 7 of the treaty of February 2, 1848, known as the treaty of Guadalupe Hidalgo, still in force so far as the river Rio Grande is concerned, either because never annulled or because recognized and reaffirmed by article 5 of the convention between the United States and Mexico of November 12, 1884? (2) By the principles of international law, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande in the Mexican minister's note referred to, are violations of its rights which should not continue for the future and on account of which, so far as the past is concerned, Mexico should be awarded adequate indemnity?"

I reply as follows:

(1) Article VII of the treaty of Guadalupe Hidalgo, while it was declared to have been rendered nugatory for the most part by the first clause of Article IV of the treaty concluded December 30, 1853, and proclaimed June 30, 1854, was, by the second clause thereof, reaffirmed as to the Rio Grande (nom. Rio Bravo del Norte) below the point where, by the lines as fixed by the latter treaty, that river became the boundary between the two countries. Said Article VII is recognized as still in force by Article V of the convention concluded November 12, 1884, and proclaimed September 14, 1886.

So far, therefore, as it affects the subject now in hand, said Article VII, in my opinion, is still in force. I am unable, however, to agree with the minister in the interpretation which he gives it.

His statement is that the city of El Paso del Norte has existed for more than three hundred years, during almost all of which time its people have enjoyed the use of the

water of the Rio Grande for the irrigation of their lands. As that city and districts within its jurisdiction did not need more than 20 cubic meters of water per second, which was an almost infinitesimal portion of the volume of water even in times of severest drought, they had sufficient water for their crops until about ten years ago, when a great many trenches were dug in Colorado, especially in the St. Louis Valley and in New Mexico, through which the upper Rio Grande and its affluents flow, so greatly diminishing the water in the river at El Paso that, except when rains happen to be abundant, there is scarcity of water from the middle of June until March. In 1894 the river was entirely dry by June 15, so that no crops could be raised, and even fruit trees began to wither. The result has been to reduce the price of land and cause great hardships to the people, whose numbers in Paso del Norte, Zaragoza, Tres Jacales, Guadalupe, and San Ignacio diminished from 20,000 in 1875 to one-half that number in 1894.

The minister further states that from a report of the assistant quartermaster-general addressed to the General-in-Chief of the United States Army, dated September 5, 1850, it appears that Captain Lowe (meaning Love), U. S. A., ascended the river in a vessel to a point several kilometers above Paso del Norte, showing that it was then navigable at that place. The minister has been misinformed. The original report, which is now before me, shows that Captain Love was instructed to carry "to the highest attainable point in the Rio Grande" his small keel boat, which "drew with her crew, provisions, arms, etc., on board, 18 inches of water." He found this point at some "impassable falls," which he named "Brookes Falls." Carrying around them "the skiff which had accompanied his boat," he rowed 47 miles farther to other

falls, which he named "Babbitts Falls." "Beyond this point he found it impossible to proceed with the skiff either by land or water," and it was "about 150 miles by land below El Paso."

The minister contends that the irrigation ditches in Colorado and New Mexico, which result in diminishing the flow of water at El Paso, come within the treaty prohibitions of "any work that may impede or interrupt, in whole or in part, the exercise of this right" (of navigation), because, as he says, "nothing could impede it more absolutely than works which wholly turn aside the water of these rivers." But Article VII is limited in terms to "the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico." Article IV of the treaty of 1853 continues the provisions of said Article VII in force "only so far as regards the Rio Bravo del Norte below the initial of said boundary provided in the first article of this treaty." It is that part alone which is made free and common to the navigation of both countries, and to which the various prohibitions apply. It is plain that neither party could have had, in framing these restrictions, any such intention as that now suggested. The fact, if such it were, that the parties did not think of the possibility of such acts as those now complained of would not operate to restrain language sufficiently broad to include them, but the terms used in the treaty are not fairly capable of such a construction.

They naturally apply only to the part of the river with which the parties were dealing, and to such works alone as either party might construct on its own side if not restrained. Though equally divided in theory between the two nations where it is their boundary, the river is in fact a unit for purposes of navigation, and therefore the treaty required the consent of both for the construction of "any

work that may impede or interrupt" navigation, even though it should be "for the purpose of favoring new methods of navigation." (Art. VII.) Up to the head of navigation no such work could have been constructed save by one of the two Governments or by its authority. The prohibition was, therefore, appropriately made applicable to them alone, and not to the citizens of either—"neither shall, without the consent of the other, construct," etc. Above the head of navigation, where the river would be wholly within the United States, different rules would apply and private rights exist which the Government could not control or take away save by the exercise of the power of eminent domain, so that clear and explicit language would be required to impose upon the United States such obligations as would result from the construction of the treaty now suggested.

Moreover, the only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. The claim now made is for injuries to agriculture alone at places far above the head of navigation. Captain Love, in the report referred to, said: "The mouth of Devils River, which is about 100 miles below the mouth of the Puerco (Pecos) and 617 above Ringgold Barracks, is the head of steamboat navigation," and that "with some difficulty" navigation by keel boats was possible "to a point 56 miles above the 'Grand Indian Crossing,' or about 283 miles above the mouth of Devils River." So far as appears, the large and numerous tributaries below El Paso supply a sufficient volume of water for the needs of navigation.

In fact, the part of the treaty now under consideration merely expresses substantially the same rights and duties which international law would imply from the fixing of the middle of the river as the boundary, viz., free naviga-

tion of the entire stream below the point where it becomes common to both nations of any work which might impede or interrupt navigation without the consent of both.

In my opinion, therefore, the claim now made by Mexico finds no support in the treaty. On the contrary, the treaty affords an effective answer to the claim by the well-known rule that the expression of certain rights and obligations in an agreement implies the exclusion of all others with relation to the same subject.

It is not necessary in order to bring this principle into play that it shall appear that either party or both actually thought of the particular matter whose exclusion is asserted, although that fact, when it appears, may serve to emphasize the inference. I am not advised whether the subject of the use of the water of the Rio Grande for irrigation was mentioned during the negotiations or not, but it is stated that such use had long been made by the Mexicans, and it was known that agriculture could not be carried on in that region without it. It was known, too,—certainly to Mexico—that this necessity existed throughout the entire region watered by the upper Rio Grande and its tributaries, for, as a province of Spain and then as an independent nation, Mexico had included both New Mexico and Colorado, and from the independence of Texas, in 1836, down to the treaty of 1848, Mexico's eastern boundary was the Rio Grande to its source. By this treaty Mexico ceded to the United States the territory west of the Rio Grande and north of the southern boundary of New Mexico, just as she had abandoned to Texas all the territory east of that river, without any reservations, restrictions, or stipulations concerning the river except those above mentioned.

Settlements had long existed in the region of Santa Fe, and the probability of the ultimate settlement of the en-

tire territory along the Rio Grande must have been apparent to both parties. Yet the treaty made no attempt to create or reserve to Mexico or her citizens any rights, or to impose on the United States or their citizens any restraints with respect to the use of water for irrigation, although rights of property in the territory were secured to all Mexicans, whether established there or not. (Art. VIII).

The treaty of 1848 was a treaty of peace; and a different rule for the construction of such treaties is laid down by some writers. (Vattel, Law of Nations, Chitty's Ed., p. 433.) If it be suggested that the circumstances under which this treaty was made bring its terms, as against the United States, within the operation of such rule, it is a sufficient answer that, even if the existence of the rule be acknowledged, it simply subjects provisions in favor of the United States to strict construction; like all rules of construction, it has no application except in cases of doubtful meaning of language used, and can not be made the means of introducing new terms. Moreover, the United States paid $15,000,000 for the territory acquired by the treaty (Art. XII), and by the treaty of 1853, which was not a treaty of peace, Mexico ceded further territory in consideration of $10,000,000 (Art. III), repeating without enlarging the stipulations of the former treaty as to rights on the Rio Grande.

(2) I have given my opinion of the construction and effect of the treaty because it is responsive to your general request, though not to your specific questions. That opinion, perhaps, in strictness, makes it unnecessary for me to consider your second question, but as that question is not put alternatively or conditionally, I proceed.

An extended search affords no precedent or authority which has a direct bearing.

There have been disputes about rights of navigation of international rivers, but they have been settled by treaty. (For a list of such treaties see Heffter Droit Int., Appendix VIII.) The subject is fully discussed by Hall (Int. Law, Sec. 39), who denies that the people on the upper part of a navigable river have a natural right to pass over it through foreign territory to its mouth. But if such right be conceded, no aid is afforded for the present inquiry, because use for navigation, being common, would not curtail use by the proprietary country, while in the case now presented, there not being enough water for irrigation in both countries, the question is, which shall yield to the other.

It is stated by some authors that an obligation rests upon every country to receive streams which naturally flow into it from other countries, and they refer to this as a natural international servitude. (Heffter Droit Int., sec. 43; 1 Phillemore Int. Law, p. 303.) Others deny the existence of all international servitudes, apart from agreement in some form. (Letters of Grotius quoted, 2 Hert., p. 106; Kluber Droit des Gens Moderne, sec. 139; Bluntschii Droit Int. Cod.; Woolsey's Int. Law, sec. 58; 1 Calvo Droit Int., sec. 556.)

Such a servitude, however, if its existence be conceded, would not cover the present case or afford any real analogy to it. The servient country may not obstruct the stream so as to cause the water to back up and overflow the territories of the other. The dominant country may not divert the course of the stream so as to throw it upon the territory of the other at a different place. (See authorities *supra*.) In either of such cases there would be a direct invasion and injury by one of the nations of the territory of the other. But when the use of water by the inhabitants of the upper country results in reducing the

volume which enters the other, it is a diminution of the servitude. The injury now complained of is a remote and indirect consequence of acts which operate as a deprivation by prior enjoyment. So it is evident that what is really contended for as a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.

Such a consequence of the doctrine of international servitude is not within the language used by any writer with whose works I am familiar, and could not have been within the range of his thought without finding expression.

Both the common and the civil law undertake to regulate the use of the water of navigable streams by the different persons entitled to it. Neither has fixed any absolute rule, but leaves each case to be decided upon its own circumstances. But I need not enter upon a discussion of the rules and principles of either system in this regard, because both are municipal, and especially as they relate to real property, can have no operation beyond national boundaries. (Creasy Int. Law, p. 164.) So they can only settle rights of citizens of the same country *inter sese*. The question must, therefore, be determined by considerations different from those which would apply between individual citizens of either country. Even if such a question could arise as a private one between citizens of one country and those of another, it is not so presented here. The mere assertion of the claim by Mexico would make it a national one even if it were of a private nature. (Gray *v.* United States, 1 C. Cls. R. 391–392.) But the use of water complained of and the resulting injuries are general throughout extended regions, so that effects upon indi-

vidual rights cannot be traced to individual causes, and the claim is by one nation against the other in fact as well as form.

The fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (Schooner Exchange *v.* McFaddon, 7 Cranch, p. 136):

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

It would be entirely useless to multiply authorities. So strongly is the principle of general and absolute sovereignty maintained that it has even been asserted by high authority that admitted international servitudes cease when they conflict with the necessities of the servient state. (Bluntschli, p. 212; see criticism by Creasy, p. 258.) Whether this be true or not, its assertion serves to emphasize the truth that self-preservation is one of the first laws of nations. No believer in the doctrine of natural servitudes has ever suggested one which would interfere with the enjoyment by a nation within its own territory of whatever was necessary to the development of its resources or the comfort of its people.

The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is

entirely inconsistent with the sovereignty of the United States over its national domain. Apart from the sum demanded by way of indemnity for the past, the claim involves not only the arrest of further settlement and development of large regions of country, but the abandonment, in great measure at least, of what has already been accomplished.

It is well known that the clearing and settlement of a wooded country affects the flow of streams, making it not only less, but also subjecting it to more sudden fluctuations between the greater extremes, thereby exposing inhabitants on their banks to increase of the double danger of drought and flood. The principle now asserted might lead to consequences in other cases which need only be suggested.

It will be remembered that a large part of the territory in question was public domain of Mexico and was ceded as such to the United States, so that their proprietary as well as their sovereign rights are involved.

It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water, or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid country through which the river runs, never large, giving much and receiving little.

The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

OPINION OF THE DISTRICT COURT.

The issues briefly stated are these:

The amended bill charges that the defendant is (1) about to obstruct the Rio Grande, a navigable river, and (2) obstruct the flow of waters and interfere with the navigable capacity of a river. That such obstructions would be in violation of the Acts of Congress of 1890 and 1892, and contrary to the treaty with Mexico.

A preliminary injunction was granted, and the defendant ordered to show cause why it should not be continued. The defendant filed its answer denying that the Rio Grande is a navigable river; and also filed special pleas justifying under right-of-way for reservoir and canals secured under the Acts of 1891, and certain Territorial laws.

The issues arise on the motion to dissolve the injunction and upon the sufficiency of the special pleas.

It may be stated at the outset that this is not a contest between private persons as to superior right by prior appropriation. When that question arises the courts will doubtless be entirely competent to deal with it.

The Rio Grande from El Paso to the Gulf of Mexico is the boundary line between Mexico and the United States, and under treaty between those republics the Rio Grande along such boundary is made free and common to the vessels and citizens of both countries. There is no guaranty by either Republic that the Rio Grande is or will continue to be navigable, but each party stipulated that it would not construct any work "below the intersection of the 31° 47′ 30″ parallel of latitude with the boundary line" which may impede or interrupt in whole or in part the exercise of the free and common use of the river.

Neither Mexico nor the United States surrendered any proprietary right to the adjacent soil or to any incident thereof. Indeed, it is expressly stipulated that the treaty shall not "impair the Territorial rights of either Republic within its established limits."

The legal effect would have been the same had the reserving clause been omitted, as under the proper rule of construction the free and unobstructed passage is ceded without prejudice to other territorial rights. The continued enjoyment of other proprietary rights must be presumed unless expressly renounced. (Vattel Law Nations, Sec. 273.)

The territory of the United States includes the lakes, seas, and rivers lying within its limits; hence, rivers flowing through it form part of its domain and cannot be considered as free to other countries any more than the adjacent lands. An exception to this general rule has been sometimes claimed where the river flows from one State through the territory of another, in favor of the right of passage to and from the inland State for commercial and other peaceful purposes. While this exception has been sometimes contested (*ex. gr.* by Spain over the Mississippi, Great Britain over the St. Lawrence, Holland over the Scheldt), it is at best regarded as an imperfect right subservient to the convenience and safety of the State affected. (Wheaton International Law, 188–205; Polson Law Nations, 30.)

It therefore seems clear that there is no duty created by international law, or by treaty, which requires that the waters collected along the Rio Grande and lying wholly within the United States shall be so discharged as to aid in the navigation of the Rio Grande along the Mexican boundary, and the diversion of waters lying wholly within the United States is not a violation of any treaty rights

secured to Mexico. If it were otherwise, the secondary and dependent right of navigation would absorb the superior and primary territorial rights of the United States over its own domain, and subject lands wholly within the limits of this republic to the burdens of a servitude not expressed in the treaty, or implied from any reasonable interpretation of its language.

This brings us to a consideration of the question as to whether the Rio Grande is a navigable river in New Mexico and at the point known as Elephant Butte within the meaning of the acts of Congress of 1890 and 1892.

Counsel on each side of this case concede that the court takes judicial notice of what are navigable rivers, but for the enlightenment of the court in this matter a great mass of documentary information has been submitted, in the shape of maps, reports of exploring and surveying expeditions made under the War and Interior Departments of the Government, and also reports of officers especially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation.

It will be observed that in the original bill it was not charged that the Rio Grande is a navigable river above El Paso, but charged that the river is navigable below El Paso and that defendant's proposed dam (125 miles above) will destroy the river as a stream, diminish the volume of water below, and materially affect its navigability. The amended bill charges that the river is navigable up as far as Roma, a short distance above the Gulf of Mexico, and is susceptible of navigation and has been navigated from Roma to a point 150 miles below El Paso (Presido del Norte) where the falls and rapids interrupt navigation, and that the river above the falls is susceptible of navigation up to La Joya, above Elephant Butte;

the bill closes this part with an allegation that the river is navigable and susceptible of being navigated as aforesaid for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico.

The course of the Rio Grande in New Mexico is through rocky cañons, and sandy valleys; in the valleys it spreads out, shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to 52 feet to the mile and the changes in its course are rapid, continual and often radical; the valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise and these were of timbers; one of these instances occurred in 1858 or 1859 when a raft was sent down from Canutillo to El Paso, a distance of twelve miles; and the other recently when some telegraph poles were floated from La Joya, "a short distance." "The water of the stream especially in central and southern New Mexico is heavily loaded with silt." The channel of the river through these valleys is usually choked with sand and in times of low water the stream divides into a number of minor channels; and apparently a large percentage of the water is lost in these great deposits of fine material." (12 Annual Rep. Geol. Sur. 204.) "From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it." (10 Annual Rept. Geol. Sur. p. 99.) "From personal observation, I know that these seasons of flood and drouth (in Rio

Grande) were of about the same character thirty years ago." (Major Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., Vols. 3 & 4, p. 39.) But what is of more importance we have reports of officials upon the exploration of the river made under directions of the Government for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it can not be made so by an open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge, do not encourage the belief that such improvements would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them * * * In my judgment the stream is not worthy of improvement by the General Government." (Rept. of O. H. Ernst, Maj. of Engrs., to Secretary of War, 1889.) Again, "I consider the construction not only of an open river channel, but of any navigable channel, to be impracticable. * * * During the greater part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal with locks, the construction of which, on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." (Rept. of Gerald Bagnall, Asst. Engnr., to Secretary of War, 1889).

The navigability of a river does not depend on its sus-

ceptibility of being so improved by high engineering skill and the expenditure of vast sums of money, but upon its natural present conditions.

In Daniel Ball, 10 Wallace, 557, the Supreme Court says: "Those rivers must be regarded as public navigable rivers in law, which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in their *ordinary condition*, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In the Montillo (20 Wallace, 431), the court says: "If it be capable *in its natural* state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway. * * * The vital and essential point is whether the natural navigation of the river is such that it affords a channel for *useful commerce*."

The court approves the language of Chief Justice Shaw in 21 Pickering, 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." (See also Morrison *v.* Colman (Ala.), 3 L. R. A. 334.) Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs, or even of thin boards, may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. (Angell Water Courses, 535.) In a recent case the Supreme Court of Oregon say, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purpose

for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord, J., said: "It must be 'susceptible of beneficial use to the public;' be 'capable of such floatage as is of practical utility and benefit to the public as a highway.'" And of the stream then in question, he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." (Haines *v.* Hall (Oregon), 3 L. R. A. 609.) The Supreme Court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public." (Rhodes *v.* Otis, 33 Ala. 578; Peters *v.* M. O. M. & C. R. Co., 56 Ala. 523.) Indeed, in the letter of inquiry by the Hon. Richard Olney, Secretary of State, in respect to the facts as to navigability of the Rio Grande in interstate commerce, among other essential qualities, he says: "It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flat

boats, and that logs are rafted or floated down from the timbered lands or the upper river for commercial purposes." (Letter Jan. 4, 1897.) The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request, it appears, that applications for right of way for irrigation by the use of waters of the Rio Grande and all of its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally; the river, in its relations to interstate commerce, is dismissed by him with an instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark: "It would now hardly be practicable to do so." (Letter Jan. 7, 1897.)

The fact that dams have been erected across the river at El Paso and other places from the earliest times, and the fact that no use has been made of the stream for navigation or floatage, are facts which, though they do not in themselves determine its susceptibility of navigation, are, nevertheless, entitled to great weight. They are facts clearly indicating the common judgment and knowledge of the people who have had the longest and most intimate acquaintance with the capabilities of the river—a knowledge founded on their own experience and that of their ancestors.

The Rio Grande is not a navigable river in New Mexico.

The next point is that even though the Rio Grande be not navigable in New Mexico, still the contemplated obstruction will diminish the waters, and thereby impair the navigability of the river at points several hundred miles below near its mouth at the Gulf, and that therefore it is an obstruction within the meaning of the act of 1890.

Counsel for defendant raise the point that the undisputed fact is that a dam has been maintained for near two hundred years across the river at El Paso by which the waters of the Rio Grande are diverted into irrigating ditches in the city of El Paso and upon Mexican soil; and that in a proceeding in equity a chancellor cannot close his eyes to the fact that apparently some other purpose than navigation is the real object of this proceeding. If, however, the threatened act of the defendant be illegal I cannot agree that the Government becomes powerless to resist it merely because others are engaged in like enterprises.

We will therefore consider the question whether the contemplated obstruction at Elephant Butte will be an illegal interference with the navigability of the river several hundred miles below towards the Gulf. The act of 1890 (1 Sup. R. S. p. 803) prohibits the creation of obstructions "not affirmatively authorized by law" to the "navigable capacity" of any waters of the United States. Its terms are more comprehensive than the act of July 13, 1892, prohibiting the erection of dams, etc., etc., in any navigable river without the permission of the Secretary of War. It is contended that under the act of 1890 an obstruction, no matter where placed, is unlawful which diverts waters from flowing into a navigable river and thereby affects the navigable capacity of such a river. But a careful reading of the acts will not, I think, sustain the contention. The act applies only to obstruction to waters of which the United States has jurisdiction, and then only to the navigable capacity of such waters. The language is, "The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited." Waters which are not

navigable are local and subject to local laws. The jurisdiction of Congress over waters arises from the power to regulate commerce between the States and foreign nations. Veazie *v.* Moor, 14 How. 568. Gould Waters, 34. Unless therefore the stream is navigable, and a means of communication between the States and foreign nations Congress is utterly without jurisdiction over it, except in respect of its riparian rights arising from the ownership of the soil through which such waters run.

We might close the opinion at this point, but the important interests and questions involved in this cause perhaps require a more extended consideration.

The riparian rights of the United States were surrendered in 1866 (R. S. 2339). Prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the right of prior appropriation of waters by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (Sec. 2339.) The Supreme Court of the United States, in passing upon this act, observes: "It is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." Atchison *v.* Peterson, 20 Wal. 507; Basey *v.* Gallagher, 20 Wal. 671. And since 1870

patents for lands expressly except vested water rights. Of course, Congress may resume its control, but there can be no presumption of an intent to take them out of local control and resume regulative power from doubtful expression. Repeals by implication are not so favored. Congress could undoubtedly preserve navigable streams by legislating against the use of their confluence. But that power could not be exercised against those private rights which have become vested, unless under the power of eminent domain compensation be paid therefor.

Instead of an intention to resume such control, Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region, and under local regulative control. Following in line with the act of 1866 the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." This act was limited to States and Territories in the arid region (1 Sup. R. S. p. 137). Colorado was included in 1891 (1 Sup. R. S. 941). By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs, for the storage and utilization of water for irrigation and the prevention of overflow, and that the lands designated for reservoirs, ditches or canals, and all lands susceptible

of irrigation therefrom, be reserved from sale or entry (1 Sup. R. S. 698). In 1890 the reservation from sale or entry of lands except as to reservoir sites was repealed; reservoir sites remained segregated (1 Sup. R. S. 791–792). In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals (1 Sup. R. S. 792). In 1891 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canal and laterals and 50 feet on the margin. In this act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective States or Territories" (1 Sup. R. S. 946). On the 26th day of February, 1897, Congress opened the reservoir site, reserved by the Government under the act of 1891, to private location, and the local legislatures were authorized to prescribe rules and regulations and fix water charges.

From these acts two things are manifest, that (1) the use of the water for irrigation purposes was authorized; and (2) that the local laws should govern the use of that water for such purposes.

In harmony with this use the Interior Department holds that in granting the right of way for reservoirs and canals it does not and cannot assume to determine or prescribe water rights, and that the flow and the use of the water is a matter exclusively under State or Territorial control. (Decisions Interior Depart., Vol. 18, 168.)

"The region in which agriculture depends on irrigation includes about four-tenths of the entire area of the United States, not including Alaska." (Report of Director Geolg. Sur. to Sec. of Interior, Mar. 13, 1888.) Throughout the vast tract classed as the arid region, ex-

tending west from about the 100th parallel, there is little or no use of water for navigation, but the cultivation of millions of acres of land is necessarily dependent upon the use of it. The authority to grant permission to divert waters for such purpose is not given to the Secretary of War, neither is it given to anyone else. Yet if such waters cannot be diverted, millions of acres now in cultivation must be turned back, a waste country, or the cultivation continued in violation of law, civil and criminal. These may be said to be considerations of policy with which the courts have nothing to do. If the law be clear, this is undoubtedly true, and the courts must administer it; but in ascertaining what the law is we cannot refrain from examining the path we are invited to pursue. The hardships and inconveniences which would result from not simply an individual case, but from the establishment of a rule, is an argument against it. And after all there is much soundness in the observation of one of the foremost of American jurists, that the growth of the law is in truth legislative. "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." (Holmes Com. Law, Lec. 1, p. 35.) The Genesee Chief case is an illustration of this. There the court disregarded the arbitrary distinction in respect to the ebb and flow of the tide suitable to condi-

tions in England and which have been followed in the earlier cases in the United States, and it was held that the admiralty and maritime jurisdiction of the United States extended to the Great Lakes and rivers without limit as to the tide, and that this jurisdiction was not founded upon the clauses of the Constitution in respect to regulating commerce, but solely by virtue of its admiralty and maritime power. The English rule was appropriate enough until the application of steam power to navigation opened the great rivers to commerce. (12 Howard, 450.)

Considering the discussion in Congress, the reports of committees, and the labors and reports of officials in the Interior and War Departments made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region had become the recognized policy and a measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but, such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and non-navigable, under the immediate direction of Government officials, and by authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona, of a prehistoric people, show that conditions which have confronted the present age

were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that "The laws heretofore in force concerning water courses * * shall continue in force." Code proclaimed by Brig. Gen. Kearney, Sept. 22, 1846.

One of the first acts of the local legislature (1852) after the organization of the Territory, provided that "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." (Com. Laws, Sec. 6.) In 1874 it was provided that "all of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take water for the said acequias from wherever they can, with the distinct understanding to pay the owner through whose land said acequias have to pass a just compensation for the land used." C. L., Sec. 17.

In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887, chap. 12.) Other acts have been passed since upon the subject in regard to the acquisition of water rights.

But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the West where the doctrine of prior appropriation prevails. This

was the character of local legislation which Congress recognized, confirmed and authorized by the various acts to which reference has been made. As an indication of the scarcity of the supply and of the great value attached to water one of the early acts of the legislature prohibited the making of paths across the fields, as they were calculated to divert the flow of the water and injure acequias. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom and judicial decision. Indeed, it is no figure of speech to say that agricultural and mining life of the whole county depends upon the use of the waters for irrigation, and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

Therefore the diversion of such local waters is not a violation of any Act of Congress even though the navigable capacity of the river at a distance below may become thereby impaired.

In conclusion, it is therefore held that the Rio Grande is not a navigable river above El Paso and that the waters thereof are local waters under local control, by the authority of Congress, and that their interruption and diversion is not a violation of any law of the United States or any treaty. In this view of the case it appears that the bill as amended is without equity and the injunction heretofore granted should be dissolved. It will be unnecessary to decide whether the waters of a navigable river may be diverted as that issue does not arise in this case. As the bill is without equity other questions which have been raised need not be considered.

GIDEON D. BANTZ,
Judge and Chancellor.

OPINION OF THE SUPREME COURT OF NEW MEXICO.

This is a suit in equity brought by the United States to restrain the Rio Grande Dam and Irrigation Company from constructing or maintaining a dam across the Rio Grande River, in the Territory of New Mexico. The structure especially aimed at is a dam projected and about to be built by the defendant company at a point called Elephant Butte, the object of which is to take water from the river, and store it in reservoirs, for the purpose of irrigation. The ground upon which the claim of the Government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity, and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of Congress.

A preliminary injunction was granted and defendant ordered to show cause why it should not be continued. The defendant answered, denying that the Rio Grande is a navigable river, and also filed pleas justifying under its right of way for canals, and reservoirs secured under the act of Congress of 1891 and certain Territorial laws. Upon the hearing, the court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the Territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed; and upon the complainant's declining to amend its bill further the court dissolved the injunction and dismissed the bill. From that judgment the United States appealed to this court.

The right of the United States to prevent the construc-

tion of the irrigation works in question is sought to be deduced chiefly from two acts of Congress, viz :

1. The act of September 19, 1890, sec. 10, which prohibits "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction."

2. The act of July 13, 1892, sec. 3, which declares that it shall not be lawful "to build any dam, weir, or structure of any kind in any navigable waters of the United States without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water."

Some allusion has been made to the treaty of Guadalupe Hidalgo of 1848, between the United States and Mexico, as containing stipulations which would be violated by permitting the contemplated construction to proceed. The only provision of that treaty bearing upon this subject simply provides in article 7, that the part of the Rio Grande lying below the southern boundary of New Mexico is divided in the middle between the two Republics, and that the navigation below said boundary "shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right." Manifestly this applied only to that portion of the river below the boundary of New Mexico, for the same article contains the further qualifying clause that—

"The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits."

Furthermore, the treaty of 1854, known as the Gadsden treaty, contains an express provision that the stipulations and restrictions of the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Grande "below the intersection of the 31 degree 57 min. 30 sec. parallel of latitude with the boundary line established by that treaty."

There is no undertaking by either of the parties to these treaties that the Rio Grande is, or shall continue to be, navigable. All that either agreed to in this connection was that it would not construct, below the point of intersection of the above-mentioned parallel of latitude, which is about that of El Paso, any work which would interfere with the common use of the river. No obligation devolved upon the United States to conserve the waters of the river above that point for the purpose of facilitating navigation below it.

We think the whole question turns upon the applicability of the acts of Congress above mentioned. By their express terms these acts deal only with navigable waters. Unless the Rio Grande is a navigable stream, and its "navigation" or "navigable capacity" will be obstructed by the proposed dam, these statutes do not apply to the case, and cannot be invoked to enable the Government to stop the progress of the work by injunction.

It is alleged in the original bill that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes, and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of Mexico. In the amended bill it is alleged that the said river is susceptible of navigation for commercial purposes up to La Joya, in the Territory of New Mexico, about one hundred miles above

Elephant Butte. In both the river is alleged to be navigable at certain points below El Paso.

It is conceded that the navigability of waters is a matter of which courts take judicial notice. The record contains a large mass of information, in the form of maps, reports of exploring and surveying expeditions made under the direction of the War and Interior Departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation.

From these and other data the following facts, as stated in the opinion of the court below, are well established:

The course of the Rio Grande, in New Mexico, is through rocky cañons and sandy valleys. In the valleys it spreads out shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away, and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from forty to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical; the valley is scarred with low ravines, made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently, when some telegraph poles were floated from La Joya, a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels, and apparently a

large percentage of the water is lost in these great deposits of fine material" (12 Annual Rpt. Geol. Sur., 204). "From Bernalillo (N. M) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it" (10 Annual Rpt. Geol. Sur., p. 99). "From personal observation, I know that these seasons of flood and drouth (in the Rio Grande) were of about the same character 30 years ago" (Maj. Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., Vols. 3 and 4, p. 39) But what is of more importance, we have reports of officials upon the exploration of the river, made under the direction of the Government, for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it cannot be made so by open-channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks or dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment, the stream is not worthy of improvement by the General Government" (Report of O. H. Ernst, Major of Engineers, to Secretary of War, 1889). Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. During the greatest part of the year, when the river is low, the discharge would be

insufficient to supply any navigable channel, except, perhaps, a narrow canal, with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable" (Report of Gerald Bagnall, Assistant Engineer, to Secretary of War, 1889).

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditures of vast sums of money, but upon its natural present conditions. In the Daniel Ball (10 Wallace 557), the Supreme Court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In the Montello (20 Wallace, 431) the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway. The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The Court approves the language of Chief Justice Shaw, in 21 Pickering, 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." See also Morrison *v.* Coleman (Ala.) (3 L. R. A. 334). Of course it need not be perenially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs or even thin boards may be considered, yet the essential quality is that

the capacity should be such as to subserve a useful public purpose. (Angell Water Courses, 335.) In a recent case the Supreme Court of Oregon says, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate a few persons it cannot be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord, J., said: "It must be susceptible of beneficial use to the public," be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question, he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." (Haines *v.* Hall (Oregon), 3 L. R. A. 609.) The Supreme Court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: Whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to public. (Roads *v.* Otis, 33 Ala., 578; Peters *v.* N. O., M. &. C. R. Co., 56 Ala. 523.) In the letter of inquiry by the Honorable Richard Olney, Secretary of State, in respect to the facts as to the navigability of the Rio Grande, in interstate commerce among other essential qualities, he says: "It should be remembered that a mere capacity

to float a log or a boat will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flat-boats and that logs are rafted or floated down from the timbered lands on the upper river for commercial purposes." (Letter January 4, 1897.) The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request it appears that applications for right of way for irrigation by the use of the waters of the Rio Grande and all its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally; the river, in its relation to interstate commerce, is dismissed by him with the instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark "It would now hardly be practicable to do so." (Letter January 7th, 1897.)

It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the center for population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly 200 years, by which the river has been obstructed and its waters diverted for irrigation to both sides

of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by any one as to interference with any use of the river for purpose of navigation. Indeed, it appears from the affidavits and reports presented in support of the bill in this case that the objection now raised to the construction of the defendant's dam grows out of the construction of an international dam and reservoir at El Paso, to be constructed under the auspices of the two Governments. The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of Congress, thus evincing the deliberate intention of the Government, by its political department, to take measures, not for the purpose of improving the navigability of this river, but of permanently constructing at a point far below the site of defendant's works, and thus to devote the stream to irrigation instead of navigation. One of the affidavits in support of the bill is made by the Commissioner of the United States engaged upon this investigation, the object of which he states to be "the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries having equitable interests therein." And he also states in one of his reports that "the probable flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed international reservoir, but that the flow will not be sufficient to supply the proposed international reservoir of the Rio Grande Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out."

That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to pro-

hibit all similar structures along the river at points above.

From these extracts it seems clearly apparent that the work at El Paso, to which the United States has committed itself, tentatively, at least, is not designed to preserve or improve the navigable capacity of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants, and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes, in aid of one locality against another.

Manifestly neither the acts of Congress cited nor the provisions of the treaty have any application to questions of this kind, and they can not be invoked to settle conflicting local interests whose determination must necessarily depend upon entirely different considerations.

The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the report of the Director of the Geological Survey, about four-tenths of the entire area of the United States, in which the rainfall is not sufficient for the production of crops. Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose could be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these

comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of Congress, for while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, Congress has, by the reservation or survey of reservoir sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

The riparian rights of the United States were surrendered in 1866 (R. S. 2339); prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more clearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriation of waters by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (Sec. 2339.) The Supreme Court of the United States, in passing upon this act, observes: "It is evident that Congress intended, although the language

used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." (Atchison *v.* Peterson, 20 Wal. 507 ; Basey *v.* Gallagher, 20 Wal. 671.) And since 1870 patents for lands expressly except vested water rights.

Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region under local legislative control. Following in line with the act of 1866 the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that: "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." This act was limited to States and Territories in the arid region. (1 Supp. R. S., p. 137.) Colorado was included in 1891. (1 Supp. R. S., pp. 249–241.) By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation ; it provided for the selection of sites for reservoirs, for the storage and utilization of water for irrigation and prevention of overflows, and that the lands designated for reservoirs, ditches, or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry. (1 Supp. R. S., 698.) In 1890 the reservation from sale or entry of lands, except as to reservoir sites, was repealed, reservoir sites remained segre-

regated. (1 Supp. R. S., 791–792.) In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. (1 Supp. R. S., 792.) In 1892 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals, and laterals, and fifty (feet) on the margin. In this act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective States and Territories." (1 Supp. R. S., 946.) On the 26th day of February, 1897, Congress opened the reservoir sites reserved by the Government under the act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. (Decision Interior Department, Vol. 18, p. 168.)

Considering the discussions in Congress, the reports of committees, and the labors and reports of officials in the Interior and War Departments, made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and non-navigable, under the immediate direction of Government officials, and by

authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona, of a prehistoric people, show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that "The laws heretofore in force concerning water courses shall continue in force." Code proclaimed by Brigadier-General Kearney, September 22, 1846. One of the first acts of the local legislature (1852) after the organization of the Territory provided that "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established to be public ditches or acequias." (Com. Laws, sec. 6.) In 1874 it was provided that "All of the inhabitants of the Territ- of New Mexico shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass a just compensation for the land used." (C. L., sec. 17.) In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887,

chap. 12.) Other acts have been passed since upon the subject in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the West, where the doctrine of prior appropriation prevails. This was the character of local legislation which Congress recognized, confirmed, and authorized by the various acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom, and judicial decision. Indeed, it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation; and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

It is contended that because the Rio Grande is capable of navigation to a limited extent several hundred miles below the point of the proposed dam its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly in the absence of some express declaration to that

effect it can not be supposed that Congress intended to strike down and destroy the most important resource of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth. For the construction contended for does not limit the prohibition of the Act of Congress to the works proposed by the defendant. It applies to the maintenance as well as the original creation of obstructions. If defendant's dam at a point where the river is not navigable is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any or its confluents to their primary sources. If upon this ground it is competent for the United States to prohibit the erection of defendant's dam it is equally competent for it to compel the removal of every dam and headgate heretofore constructed in the Rio Grande and its tributaries and prohibit the use of their waters for irrigation throughout this entire valley. It is true that courts must administer the law as they find it, and if it is clear and free from doubt the consequences, however disastrous, cannot be considered as affording grounds for its non-enforcement. But in a case like this, where it is sought by intendment to give to a statute a meaning not apparent on its face, it is the duty of the courts to give full weight to these considerations in determining what was the intention of Congress. And in view of the condition and history of the region which would be affected the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its non-navigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress by its legislation to promote irrigation throughout this portion of the country, even to the extent

of further obstruction of this very stream, it would in our opinion be unreasonable to hold that legislation which has a definite and well understood purpose in furtherance of the public interest in those portions of the country to whose conditions it is applicable was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of every interest which the legislation of Congress has otherwise undertaken to promote.

We therefore hold that the work sought to be enjoined in this action is not in violation of any law of the United States, or any treaty, and that the judgment of the district court dissolving the injunction and dismissing the bill should be affirmed, and it is so ordered.

THOMAS SMITH,
Chief Justice.

I concur in the conclusion reached.

H. B. HAMILTON, *A. J.*
N. B. LAUGHLIN, *A. J.*